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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS JAMES BRYLEY,

Defendant and Appellant.

B215603

(Los Angeles County Super. Ct.
No. LA056903)

APPEAL from a judgment of the Superior Court of Los Angeles County, Clifford L. Klein, Judge. Affirmed.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dennis J. Bryley appeals his convictions for first degree residential robbery in violation of Penal Code section 211¹ and assault with a deadly weapon in violation of section 245, subdivision (a)(1). Defendant contends: 1) the trial court improperly admitted unduly suggestive identification evidence; 2) the trial court abused its discretion by failing to strike one or both of defendant's prior serious felony convictions; and 3) defendant's sentence constitutes cruel and unusual punishment. We conclude that the photographic identification procedures were not unduly suggestive, the trial court did not abuse its discretion by declining to strike defendant's prior convictions, and defendant failed to object in the trial court that his sentence constituted cruel and unusual punishment. Therefore, we affirm.

FACTS²

On the afternoon of September 20, 2007, defendant's car hit a DHL van, which in turn hit Vernon Schmidt's car. Schmidt required medical attention and never saw defendant. Los Angeles Police Department collision investigator Roberto Martinez obtained insurance and driver's license information from all three drivers and exchanged the information for them.

That evening, Schmidt was at home with his wife Linda Cannady. Defendant knocked on the door wearing a uniform with a badge and a billed cap with "POLICE" on it. He claimed to be a Los Angeles Police Department officer investigating the car accident. Schmidt invited him in. Defendant asked Schmidt for a written statement. Defendant began writing, "I, James," hesitated, and finally wrote "Martinez." Cannady noted that his last name was the same as the officer that she had spoken to earlier. Defendant said the other officer was his cousin, but asked them not to tell anyone.

¹ All further statutory references are to the Penal Code unless otherwise stated.

² In accordance with the standard of review on appeal, the facts are stated in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466.)

Schmidt asked for identification. Defendant said he would leave and send someone with more experience.

Schmidt walked defendant to the front door. Defendant began to step out, then turned and pulled a knife from under his jacket. Schmidt ran through the house and out the back door to get help. Defendant pointed the knife at Cannady and said, "Where's the money?" Cannady got her wallet from her purse and took out six or eight \$20 bills. Defendant grabbed the money and ran out of the house. The entire incident lasted approximately 10 minutes.

The couple called the police immediately. Schmidt and Cannady described the robber to the police as a light-skinned Black or Hispanic man. Cannady said he had a medium complexion, short hair with waves, but did not have Black facial features. Defendant is Black. Later that evening, the police showed a collection of six photographs to Schmidt and Cannady in separate rooms. Four of the photos were of men with relatively dark-colored skin and two of the photos showed men with medium-colored skin, including defendant. All of the men had approximately the same facial hair and shaved or close-cropped haircuts. The ethnicity of a few of the men, including defendant, is difficult to determine from the photos. Schmidt easily eliminated five of the photos, because the individuals did not have the same features as the person he had sat next to in his house. He circled defendant's photo and wrote, "fairly close." He said that the individual had the same features and appeared fairly close to the robber. In a separate room, Cannady also circled defendant's photo and wrote, "maybe." She noted that the individual in the photo had the right coloring and the same thin oval face. Both Schmidt and Cannady identified defendant as the robber at the preliminary hearing and at trial.

Defendant was taken into custody that evening. The police discovered a sheathed knife and two sets of \$20 bills in his home. Both Schmidt and Cannady identified the knife at trial as looking like the one used by defendant. Defendant's son told officers that his father had been a security guard and used to have a uniform, belt, and badge.

Los Angeles Police Department Detectives Ninette Toosbuy and Lawrence Concepcion questioned defendant. Defendant was very emotional and said it had been

his second car accident that week. Toosbuy suggested that defendant had gone to Schmidt's house to discuss the accident. Defendant said he had been very angry, started crying, and told Toosbuy several times that he had "really screwed up." Defendant expressed regret about what had happened to Schmidt and Cannady.

PROCEDURAL BACKGROUND

Defendant was charged by amended information with two counts of first degree residential robbery in violation of section 211, two counts of assault with a deadly weapon in violation of section 245, and one count of first degree burglary with a person present in violation of section 211. The information further alleged as to all counts that: defendant had used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1); the victim Schmidt was over the age of 60 within the meaning of section 1203.09, subdivision (f); defendant had been convicted of four prior felonies within the meaning of section 1203, subdivision (e)(4); and defendant suffered two prior serious felony convictions within the meaning of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (a)(1) and (b) through (i).

Before trial, defendant moved to exclude evidence of the photo identifications on the ground that the identification procedures were inherently suggestive. The trial court denied the motion. The court granted the prosecution's motion to dismiss the count of robbery of Schmidt. Defendant waived his rights and admitted the two prior serious felony convictions. The jury found defendant guilty of the residential robbery of Cannady and assault with a deadly weapon upon Schmidt and Cannady. The jury found the weapons use enhancement as to those counts to be true. Defendant was found not guilty of burglary.

Defendant moved to dismiss one or both of his prior serious felony convictions. The trial court denied the motion on the grounds that although defendant was relatively young when he was convicted of the prior serious felonies, the prior and current crimes were violent and defendant had numerous convictions in addition to those counted as

strikes. The court sentenced defendant to the base term of 25 years to life for the robbery, enhanced by two 5-year terms pursuant to section 667, subdivision (a)(1), and one year pursuant to section 12022, subdivision (b)(1), for a total of 36 years to life. With the exception of the one year enhancement, the court imposed an identical, concurrent sentence for the assault with a deadly weapon upon Schmidt. The court imposed the same sentence for the assault with a deadly weapon upon Cannady, but stayed the sentence pursuant to section 654. Defendant filed a timely notice of appeal.

DISCUSSION

Photographic Identification Evidence

Defendant contends that the trial court improperly admitted identifications resulting from unduly suggestive identification procedures. We disagree.

Whether a pretrial photographic identification is constitutionally reliable depends on: ““(1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.” [Citation.]” (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

“The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] ‘The question is whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him.’ [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) “[T]he standard of independent review applies to a trial court’s ruling that a pretrial

identification procedure was not unduly suggestive.” (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

We have reviewed the photographic lineup in this case. As the trial court observed, it cannot be said that the lineup was unduly suggestive as a matter of law: all of the men in the photographic lineup are Black; all have similar hairstyles; and all have similar facial hair. Defendant contends that the photographic lineup was unduly suggestive because his skin tone is lighter than the other five men, and he was the only one who did not have facial features typically associated with Black men. We disagree. The description of skin color is comparative. In this lineup, the men’s skin tones vary. At least two meet the description given to the police of an individual who has a medium-colored complexion. We therefore reject defendant’s argument that he had the lightest skin color. Furthermore, defendant’s claim that he was the only man who did not have facial features typically associated with Black men is incorrect. The photos depict a variety of facial features. “Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to ‘stand out’ from the others in a way that would suggest the witness should select him.” (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) In this case, nothing improperly caused defendant to stand out, as evidenced by the fact that Schmidt’s and Cannady’s identifications of defendant from the six-photo array were tentative at best and fairly inconclusive. Exercising our independent review of the trial court’s ruling, we conclude that the photographic lineup was not unduly suggestive under the circumstances.

Moreover, under the totality of the circumstances, there is no substantial likelihood that Schmidt and Cannady misidentified defendant when they viewed the photographic lineup such as to warrant reversal of a conviction. Schmidt and Cannady conversed with defendant in their own well-lit living room for approximately 10 minutes. The identifications occurred only a few hours after the crime. Schmidt and Cannady both identified defendant at the preliminary hearing and at trial. Based upon this record, defendant has not met his burden of establishing, under the totality of the circumstances, an unreliable identification procedure.

Prior Serious Felony Convictions

Defendant contends that the trial court abused its discretion by denying his motion to strike his prior serious felony convictions in light of the length of time that had passed and his relatively minor criminal history following the prior convictions at issue. Our review of the record reveals no abuse of discretion.

Under section 1385, the trial court has discretion to strike a prior felony conviction allegation in furtherance of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.) In order to do so, the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

A trial court must enter a statement of reasons in the minutes of the court when dismissing a prior conviction; however, it is not required to ““explain its decision not to exercise its power to dismiss or strike.”” (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*)).) “““[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.”” [Citations.]” (*Id.* at pp. 376-377.) Therefore, we review the trial court’s decision to determine whether it is “so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

In this case, we find no abuse of discretion. Defendant was convicted on June 5, 1979, for the serious felony of robbery in violation of section 211 and spent 23 months in the custody of the California Youth Authority, and he was convicted on November 3, 1987, for the serious felony of residential burglary in violation of section 459 and sentenced to 2 years in state prison. After these serious felony convictions, he regularly

committed additional crimes. His probation report states that after he was paroled in November 1988, he was arrested on December 21, 1988, for attempted robbery and petty theft and sentenced to 2 years in state prison. He was paroled in January 1990, but arrested in May 1990 for grand theft of an automobile, convicted of petty theft, and sentenced to 3 years in state prison. He was paroled in 1992. In 2000, defendant sustained a misdemeanor contempt conviction and was placed on probation. On May 28, 2005, he was arrested for domestic violence, but the case was dismissed in the furtherance of justice. In addition to the continuous nature of defendant's criminal history, the prior and current serious felony convictions involved dangerous crimes to the public. In sum, defendant failed to show that he must be deemed outside the spirit of the three strikes law in any part. (See, e.g., *People v. Williams*, *supra*, 17 Cal.4th at p. 163.)

Cruel and Unusual Punishment

Defendant contends his sentence violates the California and federal constitutional proscriptions against cruel and unusual punishment. We disagree.

The United States Constitution prohibits the imposition of cruel and unusual punishment (U.S. Const., 8th Amend.), and the California Constitution prohibits the imposition of cruel or unusual punishment (Cal. Const., art. I, § 17). Claims of cruel and/or unusual punishment not raised in the trial court are forfeited. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Defendant did not assert in the trial court that his sentence violated the constitutional proscription against cruel and unusual punishment, and therefore, he failed to preserve the claim for appeal.

Even if the issue were properly before this court, we would find that defendant's sentence does not violate the constitutional proscriptions against cruel and/or unusual punishment. In *Ewing v. California* (2003) 538 U.S. 11, 23-24 (*Ewing*), the Supreme Court endorsed the approach originally set forth in Justice Kennedy's concurring opinion in *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-1001—the Eighth Amendment does

not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are “grossly disproportionate” to the crime. (*Ewing, supra*, 538 U.S. at p. 23, quoting *Harmelin v. Michigan, supra*, at p. 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288.) Under this state’s Constitution, a punishment may violate article I, section 17 “if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Preciado* (1981) 116 Cal.App.3d 409, 412.) “An examination of the nature of the offense and of the offender, ““with particular regard to the degree of danger both present to society”” is particularly relevant in determining this issue.” (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000.) “Because choosing the appropriate penalty is a legislative weighing function involving the seriousness of the crime and policy factors, the courts should not intervene unless the prescribed punishment is out of proportion to the crime. [Citation.]” (*Id.* at pp. 999-1000.)

Defendant, who is 49 years old, argues his sentence of 36 years to life constitutes cruel and unusual punishment because he is unlikely to live to his parole eligibility date. The premise for this contention is entirely speculative. In any event, this case involved a premeditated, violent attack on elderly victims in their home. Defendant impersonated a police officer, wore a uniform, came armed with a knife, and used details of the car accident to gain entry. Defendant also has a substantial criminal history, including other violent crimes. Based on defendant’s actions in this case and his recidivist behavior, he has failed to show that the punishment offends fundamental notions of human dignity or shocks the conscience. (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.